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FILED

12/15/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

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December 7, 2016

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MT Supreme Court
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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: Proposed adoption of Rule 8.4(g) of the Montana Rules of Professional Conduct

Dear Honorable Justices:

Recently I read an opinion that if this proposed rule is adopted, a lawyer could lose her job by publicly stating that marriage is between a man and a woman. "Really?" I thought. But as I pondered the ramifications of the proposed new rule, I realized that this opinion was not so far fetched.

The proposed new rule would declare that it is professional misconduct "to engage in conduct... that is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.." We all know that the ultimate potential consequence of professional misconduct is disbarment.

Here is the problem: There are many reasonable, compassionate, fair-minded people who believe, as a matter of conscience and faith, that homosexuality is a moral, not a civil rights issue. Many Christians believe that same sex attraction, as well as various other inclinations or behaviors, if pursued, will drive a wedge in our relationship with a holy God. Adherents to other faiths are of the same opinion. Followers of Christ believe that God, in His mercy and grace, knowing of our inability to remove this wedge by our own strength, sent His Son to bridge the gap, so that all who cross that bridge can be reconciled not only with God, but with one another. Some are offended by this statement of faith. Others have found great hope in it. So has it been throughout history, from the manger to the cross to the present.

A few years ago Montanans amended our Constitution to confirm, by a large majority, that marriage is between a man and a woman, which had been assumed for centuries. This was recently overturned by a 5 to 4 decision of the U.S. Supreme Court. Are those attorneys who agreed with the minority in that case now precluded from expressing an opinion that the decision was morally and legally incorrect, because some will perceive expression of that opinion as

harassment or discrimination? Is our choice to remain silent, or to be disciplined? Is this not a slippery slope leading to thought police or totalitarianism?

I have been practicing law for 41 years in a small town in Montana. I have had clients who are homosexual, or who engaged in other behaviors I did not personally agree with. I respected them. They respected me. I provided them with the legal services they needed. What if one of those clients confided in me that he was considering marriage with his partner. He was not sure, however, and asked for my opinion. Could I suggest that he seek counsel with his pastor, or a trusted family member, or a trusted friend? Could I point out that many of the same benefits of marriage could be obtained by use of wills, durable powers of attorney, medical advance directives and beneficiary designations? Or would I be running the risk that his partner would report me to the Commission on Practice?

Speaking of the Commission on Practice, are they the correct venue to sort out the constitutional rights of freedom of expression, freedom of religion and the perception of harassment and discrimination that this proposed rule would introduce? Do they really want to take on this role? To be reported to the Commission on Practice, by the way, even if exonerated, is a scary, time-consuming and expensive proposition.

Several years ago I was the Court-Appointed Guardian Ad Litem for a boy who had been sexually assaulted by an adult male. He had various problems, and had been sent to an out of state treatment facility. I received a report that he was experiencing confusion about his sexual identity. The staff had referred him to an LGBT support group. I was appalled and I objected. This young man, whose physical sexuality had been prematurely stimulated, was being steered to a life style he most likely would not have chosen but for the fact that he had been assaulted. Had this proposed rule been in effect at that time, would I have been reported to the Commission on Practice?

In recent months the Montana Lawyer had an article regarding the lack of legal services in remote, rural areas of Montana. It should be noted that the existing attorneys living and practicing in those small communities perform countless hours of free and reduced-fee legal services for their neighbors. It will not help matters if those attorneys who subscribe to the statement of faith noted above, are excluded from the practice of law. A few years ago I was privileged to assist with the drafting of a petition, initiated by local churches in Superior, Montana, denouncing a small number of white supremacists who were holding a "national convention" on the outskirts of town. The response from the community was an overwhelming rebuke of that bigotry. It is entirely unfair, however, to label as bigots and homophobes, those who respectfully disagree with the homosexual lifestyle on moral grounds.

The proposed rule has been submitted by the American Bar Association. I question whether it is needed in Montana. What is broken that needs to be fixed? The existing Rules of Professional Conduct hold attorneys to a high standard. If an attorney's conduct demonstrates improper prejudice, he or she will be held accountable under the existing rules, or he or she will be shunned by potential clients and the community. In the marketplace of ideas, the light of day will reveal the truth.

There are many other issues in our society which need our attention. Let us who are in the trenches not only continue to serve the everyday legal needs of our neighbors, but let us also focus our attention on seeking justice for the poor, the orphan, the widow and the oppressed.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Doug Austin". The signature is written in dark ink and is positioned above the printed name.

Douglas R. Austin

DRA:dkf